No. 94-1566

FILED
APR 21 1995
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

RALPH P. FORBES & THE PEOPLE — PETITIONERS

vs.

AETN, KHOG, et. al. — RESPONDENTS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

The Court of Appeals did not err in holding that Mr. Forbes' failure to exhaust his administrative remedies with the FCC was fatal to his statutory claim against the private television stations and their manager or that a 42 U.S.C. 1983 remedy was unavailable.

II.

The Court of Appeals correctly held that petitioner's amended complaint did not state a cause of action under 42 U.S.C. 1985.

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CITATIONS OF THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The Letter Opinion of the District Court of the United States District Court for the Western District of Arkansas dated December 16, 1992 was not published. It is found in Appendix Vol. 1, p.20a-25a. The decision of the Court of Appeals for the Eighth Circuit is reported at 22 F.3d 1423 (8th Cir. 1994) (En Banc) and was filed April 28, 1994 (App. Vol.1, p.1a-15a).

STATEMENT OF THE CASE

Petitioner, Mr.Forbes, by Amended Complaint filed November 2, 1992, included private television stations KHBS and its affiliate, KHOG, and Darrel Cunningham, the general manager of the stations, as Defendants. The substance of Forbes' Amended Complaint against these Defendants was that Cunningham refused to run a certain political television advertisement depicting the "products" of abortion except in such time slots designated as "safe harbor" hours. Forbes' Complaint sought relief pursuant to 42 U.S.C. 1983 and 1985 as a consequence of alleged censorship in violation of 47 U.S.C. 315.

On November 20, 1992, the stations and Cunningham filed a Motion to Dismiss based upon lack of subject matter jurisdiction and that Forbes had failed to exhaust his administrative remedies. After response by Mr. Forbes', filed December 4, 1992, the District Court by letter Opinion and Order dated December 17, 1992, granted the Motion to Dismiss and Forbes' appealed to the Eighth Circuit Court of Appeals. The Court of Appeals for the Eighth Circuit, En Banc, affirmed the dismissal of Forbes' Amended Complaint against the private stations and their manager, Mr.Cunningham, by its Opinion filed April 28, 1994.

ARGUMENT

I.

THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT MR.FORBES' FAILURE TO EXHAUST HIS ADMINISTRATIVE REMEDIES WITH THE FCC WAS FATAL TO HIS STATUTORY CLAIM AGAINST THE PRIVATE TELEVISION STATIONS AND THEIR MANAGER OR THAT A 42 U.S.C. 1983 REMEDY WAS UNAVAILABLE.

Under the Communications Act of 1934, 47 U.S.C. 151 et seq. Congress has expressly authorized the FCC to regulate the telecommunications industry. It has vested the FCC with authority to conduct administrative proceedings necessary to resolve matters arising under this mandate. Thus, under 47 U.S.C. 151, the FCC is charged with the duty to "execute and enforce the provisions of this chapter [47 U.S.C. Ch. 5]." Under 47 U.S.C. 154(j), the FCC is broadly authorized to "conduct its proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice."

47 U.S.C. 312, at issue in this litigation, outlines the power of the FCC to "revoke any station license or construction permit" and provides for such revocation "for willful or repeated failure to allow reasonable access to or to permit

purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified Federal candidate for Federal elective office on behalf of his candidacy." (47 U.S.C. 312(a)(7)) Prior to such a revocation, the FCC must serve upon the licensee a show cause order and permit the licensee to appear before the Commission. (47 U.S.C. 312(c)).

Section 315(a) (47 U.S.C. 315(a)) also involved in this litigation, provides that if the licensee should permit any legally qualified candidate for any political office to use the broadcasting station, then the licensee "shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station." Section 315(a) further provides that the licensee "shall have no power of censorship over the material broadcast under the provisions of this section." Section 315(c) instructs the Commission to "prescribe appropriate rules and regulations to carry out the provisions of this section."

The FCC is the agency charged with enforcement of the Section [47 U.S.C. 315] at issue. In fact, a few days before Mr.Forbes filed his Amended Complaint, the FCC issued a public notice with request for comments on whether broadcasters could "channel...into those hours when there is no reasonable risk of children being in the audience, candidate 'uses' that

present graphic depiction of dead or aborted and bloodied fetuses or fetal tissue." In the Matter of Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communication Act, FCC 92-486, MM Docket No.92—254. Thus, not only does the FCC have the exclusive jurisdiction to address the issue raised by Forbes' Complaint, it is currently considering this very question. The agency has informed Mr.Forbes of this fact. (Vol.1, App., p.68,69)

The Eighth Circuit Court of Appeals, En Banc, affirmed the District Court which had dismissed Forbes' statutory claims holding that there is no private cause of action to enforce 47 U.S.C. 315 and that Forbes had failed to exhaust his administrative remedies. Forbes, 22 F.3d 1423, at 1427, 1428.

A series of decisions have held that there is no private cause of action to enforce alleged violations of the Communications Act and that an individual claiming a violation of the statute must exhaust his administrative remedies.

In DeYoung v. Patten, 898 F.2d 628 (8th Cir. 1990), the Court held that there is no implied private cause of action under the Federal Communications Act and that claimed violations of the FCA are not enforceable under 42 U.S.C. 1983. In Belluso v. Turner Comm. Corp., 633 F.2d 393 (5th Cir. 1980), the Court

examined the role of the Federal Communications Commission in enforcement and implementation of the FCA. The Court concluded:

> "The existence of this pervasive statutory and administrative scheme is strong evidence that Congress intended the administrative remedy to be exclusive. Likewise...creation of a private cause of action would be inconsistent with the clear legislative intent to centralize enforcement of the Act in the expert agency." Id. at 397.

In Daly v. CBS, Inc., 309 F.2d 83 (7th Cir. 1962), the Court said:

> "There is no provision in Sec. 315(a), or in any other part of the Act, which gives a private individual a cause of action to recover damages for an alleged violation of the Act. In the twenty-eight years since the enactment of the Act, no court, as far as we are advised, has ever held that a private individual had a right of action against a licensee to recover damages for a violation of Sec. 315(a)." Id. at 85.

In Cyntje v. Daily News, et al, 551 F.Supp. 403 (1982) the Court noted at page 406:

> "It has been consistently held moreover, that Section 315 of the Federal Communications Act does not directly or impliedly create a private cause of action for those aggrieved by the actions of a broadcaster...Thus, in the absence of evidence that a fairness doctrine complainant initially availed himself of the administrative procedures set forth in 47 C.F.R. 1.41 (1981) ("Informal requests for Commission action") and thereafter exhausted such steps, the District Court lacks subject matter jurisdiction to adjudicate the matter. 47 U.S.C. 401, 402."

See Lamb v. Griffin Television, Inc., 804 F.Supp. 1430 (W.D. Okl. 1992) (granting motion to dismiss for claimed violation of 47 U.S.C. 315). The case of Maher v. Sun Publications, Inc., 459 F.Supp. 353, 356 (D.C. Kan. 1978) cites Ackerman v. CBS, Inc. 301 F.Supp. 628 (S.D. N.Y. 1969) and Gordon v. N.B.C., 287 F. Supp. 452 (S.D. N.Y. 1968) in concluding:

> "Thus, there seems no question that the primary and exclusive forum in which to institute and prosecute alleged violations of 47 U.S.C. 315 by broadcast licensees is the Federal Communications Commission."
>
> ***
>
> Although the administrative remedy may seem inadequate to plaintiff, it is well established that matters concerning the scope and application of Section 315 should be deferred to the administrative expertise of the FCC."

As the court noted in Ackerman v. CBS, et al, 301 F.Supp. 628 (S.D. N.Y. 1969) at page 631, 632:

> "The Commission is the primary and exclusive forum in which to institute and prosecute alleged violations of Section 315(a) by broadcast licensees. The sole function of the courts in enforcing the statutory provision is to review final orders of the FCC in accordance with the statutory scheme."
>
> ***
>
> "Although plaintiffs allege that they have 'unsuccessfully' appealed to the Commission, they do not aver that

they commenced any proceeding in accordance with the rules and regulations of the Commission, that they sought judicial review of the Commission's denial of relief, or that review is unavailable to them. They have failed to exhaust available administrative procedures under the Act."

Other authorities supporting the exclusiveness of the FCC as the forum requiring exhaustion of administrative remedies are Christian Populist Party v. Secretary of State, 650 F.Supp. 1205, 1211, (E.D. Ark. 1987); Michigan United Conservation Clubs v. CBS News, 485 F.Supp. 893, 903 (W.D. Mich. 1980); Post v. Payton, 323 F.Supp. 799, 802 (E.D. N.Y. 1971).

Petitioner has cited no authority holding that there is a private cause of action to enforce alleged violations of the Communications Act or that it is not necessary for an individual claiming a violation of the Communications Act to exhaust his administrative remedies.

The Court of Appeals was correct in affirming the findings by the District Court that Forbes had failed to exhaust his administrative remedies. The record reveals that "Forbes' first letter to FCC complaining of KHOG defendants censorship of ads" is dated November 2, 1992. (App. Vol. I, p. 65,66) The Amended Complaint which added the private television stations (the KHOG defendants) was filed on the same day, alleging

censorship occurring the previous Friday, October 30, 1992. (App. Vol.1, p.76-81) Petitioner alleged in his Amended Complaint only that he had attempted to call the FCC but that the telephones were not answered. (App. Vol.1, p.78,79) Thus, the record reflects the initial action toward an administrative remedy and this litigation against the private television stations were begun on the same day.

Even where a plaintiff asserts a violation of a federal right, it may be shown that Congress "specifically foreclosed a remedy under 1983 by providing a comprehensive enforcement mechanism for protection of a federal right." DeYoung v. Patten, 898 F.2d 628, 634 (8th Cir. 1990). In DeYoung, supra, the court found that the existence of a comprehensive administrative mechanism to enforce candidates' rights rendered a 1983 remedy for violation of those rights inconsistent with the overall legislative scheme.

To the extent that Mr.Forbes complains about FCC inaction (Pet. for Writ, p.11-15), his argument supports the proposition that the District Court did not have subject matter jurisdiction over his claims. Indeed, this was the Opinion of five Justices below in the Court of Appeals:

> "As a preliminary matter, however, I would hold that the FCC has exclusive jurisdiction of this litigation, including

both the statutory and the constitutional claims, with judicial review in the Court of Appeals and then the Supreme Court. See Telecommunications Research & Action Center v. FCC, 750 F.2d 70, 77 (D.C. Cir. 1984); see also Columbia Broadcasting Systems, Inc. v. Democratic National Comm., 412 U.S. 94 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). Forbes should have taken his complaints to the FCC in the first instance. Litigation in the district court is inconsistent with and necessarily undermines the exclusive jurisdiction of the FCC.

***

I also agree that the district court correctly dismissed Forbes's Federal Communications Act claims against the AETN defendants for excluding him from the debate and for refusing him air time and against the private stations for refusing to broadcast his political advertisements except during the safe-harbor hours. Id. at 6. The district court lacked subject matter jurisdiction over these claims. Forbes should have taken these complaints to the FCC first. Forbes did not do so. The FCC has considered complaints involving candidate debates as well as complaints involving anti-abortion advertisements. Then, had the FCC ruled against him, Forbes could have sought judicial review in the court of appeals, not the district court. DeYoung v. Patten, 898 F.2d 628, 633-34 (8th Cir. 1990) (no implied private right of action)."

(App. Vol. 1, p.12,13)

Thus, all the Justices agreed that the District Court properly dismissed Forbes' Complaint. The minority opinion supported dismissal for the additional reason of lack of subject

matter jurisdiction. Therefore, the authorities relied upon by both Mr.Forbes and the minority opinion below clearly establish that review of alleged inaction of the FCC is in the Court of Appeals and not the District Court.

Forbes' argument that he was not required to exhaust his administrative remedies was rejected by both the District Court and the Court of Appeals and by virtually every court which has considered the question. His argument relating to FCC inaction is support for the proposition that the District Court did not have subject matter jurisdiction over his claims. Under either argument, his Petition should be denied.

II.

THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONER'S AMENDED COMPLAINT DID NOT STATE A CAUSE OF ACTION UNDER 42 U.S.C. 1985.

The Amended Complaint, which added the private stations as Defendants, states with regard to a conspiracy allegation:

> "This Complaint embraces and must comprehend a long string of abuses and pattern of continuing conspiracyagainst the people and their rights. The instant case against KHBS TV, et al, as more fully shown, is further proof of the arrogance and malice of this wicked conspiracy against the people and their inherent rights to choose their own representatives based upon their in-

formed consent." (App. Vol.1, p. 80)

The Court of Appeals found that: "We further agree with the district court that there is insufficient substance to Forbes' conspiracy claim to entitle him to relief under 42 U.S.C. 1985." 22 F.3d at 1428. The concurring opinion likewise states:

> "Assuming the district court did have jurisdiction, I agree the district court correctly dismissed Forbes' 42 U.S.C. 1985 civil conspiracy claim because his allegations were too vague...." Forbes, 22 F.3d at 1431.

The Court of Appeals did not decide whether a properly pled conspiracy claim would state a cause of action for a violation of 47 U.S.C. 315 or whether a 1985 remedy would be foreclosed by the comprehensive administrative mechanism of the Federal Communications Act. Presumably, such a remedy would also be foreclosed for the same reason. However, it is clear that where the allegations of a claim are conclusory and devoid of factual basis, dismissal pursuant to Rule12(b)(6) is warranted. McClure v. Esparza, 556 F.Supp. 569 (E.D. Mo. 1983) (aff'd 732 F.2d 162 (8th Cir. 1984)), cert denied, 471 U.S. 1052, 105 S.Ct. 2111, 85 L.Ed.2d 477 (1985). See also Slotnick v. Garfinkle, 632 F.2d 163, 166 (1st Cir. 1980). Accordingly, both the District Court and the Court of Appeals properly found that the Complaint failed to state a claim under 1985.

CONCLUSION

For the foregoing reasons, the Court should deny certiorari.

April 20, 1995 Respectfully submitted.

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